No. 86-381

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN BERNARDINO,
Respondent,

RICHARD SMOLIN AND GERARD SMOLIN,
Real Parties in Interest.

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court overturn a judgment barring the extradition of a party who, as a matter of law, cannot be validly charged with the offense for which his extradition is sought?

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INTRODUCTION AND SUMMARY OF ARGUMENT

This extradition case is not without considerable interest. Its facts are quite unusual, and one lower court which

ordered extradition suggested its own decision was "a perversion of the federal system".[1] The very aspects of the case which have attracted attention, however, render it unsuitable for review by this Court. Its unique facts mean that the carefully tailored decision of the California Supreme Court barring extradition will have little or no impact on federal law or the functioning of the extradition process among the fifty states.[2] Furthermore, without doing violence to well-established principles of extradition law, the decision below prevents the use of knowingly false statements in this

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1/See Petitioner's Appendix (hereafter "Pet. App.") B, at 18. Petitioner's Appendix B is a copy of the decision of March 26, 1985 by the California Court of Appeal, Fourth District, Second Division, ordering the extradition of Real Parties In Interest Richard and Gerard Smolin (hereafter "the Smolins") to Louisiana to face charges of kidnapping Richard's children, Jennifer and Jamie.

2/That decision, rendered on May 1, 1986 and (cont.)

proceeding to gain advantage in a related child custody matter, a most compelling reason for leaving the ruling of the California Supreme Court intact.

Briefly stated, this case involves a charge of kidnapping filed in Louisiana against Richard Smolin and his father Gerard, who are California residents. The purported victims were Richard's two children, Jennifer and Jamie. The charge was baseless, because at the time of the alleged crime, Richard was the sole legal custodian of his children under a valid order issued by the only court empowered to determine the custody arrangements of the Smolin children. More importantly, the kidnapping prosecution was grounded on what can fairly be characterized

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2. (Cont.)

reported at 41 Cal.3d 758, 716 P.2d 991, is attached to California's petition (hereafter "Pet.") as Appendix A.

as perjury: a declaration under oath by Judith Smolin Pope, Richard's ex-wife and the mother of Jennifer and Jamie, that Richard had no legal claim to custody of the children, an assertion Judith knew to be untrue at the time she made it.

Although the California Court of Appeal "abho[red]" this improper use "of our federal system to further this custody battle . . .", it felt constrained by the constitutional prohibition on a general inquiry during extradition proceedings into guilt and innocence to order the Smolins' return to Louisiana (Pet. App. B, at 16). The California Supreme Court, well aware of the same constitutional strictures, did not permit the Smolins to challenge their extradition through a broad claim of innocence nor did it approve an evidentiary hearing on that question. Rather, it found

that the Smolins were not and could not be "substantially charged" with the offense of kidnapping Richard's children. In so doing, it relied on nothing more than the charging documents in the case and certain relevant legal orders, of which it took judicial notice. Since a lack of "substantial charging" has long been recognized as a constitutionally valid basis upon which to challenge an extradition order, and since judicial notice traditionally has been utilized to determine whether a party facing extradition has been substantially charged, the decision below is both legally sound and indisputably just.

STATEMENT OF THE CASE

Richard and Judith Smolin were divorced in 1978 by the San Bernardino Superior Court in California. Judith was given custody of their two children, with reasonable

visitation rights granted to Richard, who has remained a California resident since that time. As part of its dissolution agreement Judith agreed not to take the children from California without the consent of Richard.[3]

After remarrying, Judith violated the dissolution agreement by taking the children to Oregon without notice to Richard. During the next two years she moved the children from Oregon to Texas, then from Texas to Louisiana, each time concealing their location from Richard for varying periods of

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3/ See Appendix A, attached to this brief (hereafter Smolin App. A), portions of an opinion of the California Court of Appeal, Fourth Appellate District, Second Division, issued on February 25, 1986. In Re the Marriage of Smolin, E001146, at page 3. This opinion is referred to in California's petition for certiorari at 9-11 n. 5, and was cited in the decision below. (Pet. App. A, Lucas dissenting, at 11 n. 4.)

time, thereby deliberately frustrating his visitation rights.[4]

In 1980, Richard moved for and obtained a joint custody order from the San Bernardino Superior Court (Pet. App. B, at 3), the only judicial forum empowered to modify the 1978 custody decree (see Argument I, infra). When Judith refused to honor the specific visitation rights provided to Richard in that joint custody order, on February 27, 1981 Richard obtained from the same court an order granting him sole custody of his children (Pet App. A, at 4; Smolin App. A, at 5). Judith was personally served in both of these modification proceedings (Pet. App. A, at 3-4; Pet. App. B, at 3).

For almost two years after obtaining sole custody of his children, Richard was

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4/ See Smolin App. A, at 3-6.

unable to locate them, because Judith had moved them from Texas to Louisiana without informing Richard of their whereabouts (Smolin App. A, at 6). After Richard did learn their location and began to write and call them, Judith and her new husband James Pope filed a Louisiana adoption action aimed at severing Richard's parental rights and making Mr. Pope the legal father of Jennifer and Jamie Smolin (Smolin App. A, at 7). That action later was found to verge "on the fraudulent," a fair characterization, as Judith represented in the adoption proceeding that Richard had no interest in supporting and establishing communications with his children, and "yet the history of this case shows that interest was always there." (Pet. App. C, at 4-5.)

On March 9, 1984, confronted with the possibility that his relationship with the

children he loved might be declared a legal nullity, and "armed with the latest California custody order, Richard and his father, Gerard, 'picked up' the children at a school bus stop in Louisiana and brought them back to California" (Pet. App. B, at 4).

On April 11, 1984, Judith submitted to the jurisdiction of the San Bernardino Superior Court, and filed a motion to modify the court's 1981 order granting Richard sole cutody of Jennifer and Jamie Smolin (Pet. App. A, at 7; Smolin App. A, at 9). Despite this recognition of the existence of the California order granting full custody of the children to Richard, on April 30, 1984, Judith swore under penalty of perjury before a judge in Louisiana that on March 9, 1984 "Richard Smolin and Gerard Smolin [had been] without authority to remove children from affiant's custody" (Pet. App., at 5-6, Pet.

App. B, at 5-6). That affidavit, which accompanied and served as the basis for Governor Edwards' demand for the Smolins' extradition, never mentioned the California decrees under which Judith received custody of Jennifer and Jamie in 1978, nor the 1980 and 1981 modification orders granting Richard joint, and then sole, custody of his children (id.).

On May 31, 1984, the San Bernardino Superior Court denied Judith's motion to modify custody and reaffirmed its 1981 order granting Richard sole custody of his

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children.[5] Two weeks later, Governor Edwards executed his requisition demand for the arrest and extradition of the Smolins based on the aforementioned affidavit of Judith which falsely claimed Richard had no authority to take custody of his children (Pet. App. B, at 5-6). On August 23, 1984,

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5/It was this order, as well as the file on which it was based, which the same court judicially noticed on August 24, 1984, in granting the Smolins a writ of habeas corpus barring their extradition to Louisiana (Pet. App. C). Judith's appeal of this reaffirmation of the 1981 custody order produced the appellate decision attached as Smolins' Appendix A. On appeal, Judith argued: a) that the 1981 sole custody order was invalid at the time it was issued; and b) that the Superior Court should not have reaffirmed that order in May of 1984. The Court of Appeal explicitly found that the 1981 sole custody order was valid (Smolin App. A, at 10-20). It then proceeded to consider "the order of May 31, 1984, 'reaffirming' the sole custody in Richard which was granted under the order of February 27, 1981" (id., at 23). It reversed and remanded that order, directing the trial court to consider whether a joint custody order would be more appropriate (id., at 23-24).

Governor Deukmejian of California issued extradition warrants against the Smolins (Pet. App. B, at 6).

On August 24, 1984, the San Bernardino Superior Court issued a writ of habeas corpus barring the extradition of the Smolins (Pet. App. C). That order was overturned reluctantly by the California Court of Appeal. Although believing itself powerless to do other than surrender the Smolins to Louisiana, the majority commented:

> We remain curious as to why Governor Deukmejian's office has apparently declined to inform the Louisiana authorities about the latest California award of custody in a proceeding in which Judy personally participated. If there has been such transmission of information, our perplexity yet remains over what good purpose would be served in pursuing this matter as a criminal case. Certainly real parties acted rashly, but to put them through a criminal trial when, on all the facts, it seems apparent that no crime has been committed suggests to us a perversion of the federal system.

(Pet. App. B, at 18) (emphasis in original).

On May 1, 1986, the California Supreme Court overturned the Court of Appeal decision and barred the extradition of the Smolins. The Court recognized that it could not make a general inquiry into the Smolins' guilt or innocence (Pet. App. A, at 19). The Court quite sensibly noted, however, that the obvious innocence of the Smolins should not serve to defeat an otherwise well-founded challenge to their extradition (id., at 18-19). Taking judicial notice of the California decisions in the Smolin custody matter, the Court found the Smolins were charged in the extradition papers with kidnapping children of whom Richard was legal custodian. Since those allegations do not

state a crime under Louisiana law, the Court concluded the Smolins were not substantially charged and could not be extradited.

REASONS FOR DENYING THE WRIT

I

AS A MATTER OF LAW, THE SMOLINS CANNOT BE VALIDLY CHARGED OR CONVICTED OF THE KIDNAPPING OF JENNIFER AND JAMIE SMOLIN

The issue now in dispute between California and the Smolins is indeed specific and narrow, as most elements of the claim upon which the Smolins prevailed in the court below are presently uncontested. To begin, it is agreed that an individual is entitled to judicially challenge his impending extradition on the ground the extradition documents themselves establish, as a matter of law, that he cannot be validly charged and convicted of the crime of which he is accused in the demanding state. See Pet., at 19,

citing Roberts v. Reilly, 116 U.S. 80, 95 (1885) (Issue of substantial charge under laws of demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus").[6]

There is also no dispute that the crime of which the Smolins are charged in Louisiana -- the kidnapping of Richard's children -- cannot be committed by a parent "to whom custody has been awarded by any court of competent jurisdiction of any state," since the crime is defined as the taking of children from their legal custodian. See

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6/The Uniform Criminal Extradition Act, to which both California and Louisiana subscribe, also requires that an extradition demand be accompanied by documents which substantially charge a crime under the law of the demanding state. (Pet. App. A, at 14-15.)

Louisiana Revised Statutes (hereafter R.S.A.) §14.45(4). California agrees that extradition may be successfully challenged in the courts of the asylum state when the requisition documents themselves allege or reveal facts which establish that the alleged fugitive has committed no crime under the laws of the demanding state.[7] Consequently, had the extradition papers from Louisiana either alleged, or revealed facts sufficient to establish, that Richard was the legal custodian of his children in March of 1984, the courts of California concededly would have been entitled, if not obligated, to block the Smolins' extradition.

7/See California's discussion, at pages 21 and 22 of its petition, of Application of Varona, 232 P.2d 923 (Wash. 1951). Varona was relied on by the California Supreme Court in blocking the Smolins' extradition. (Pet. App. A, at 20-21.)

Furthermore, although California considers the question irrelevant, there can be no question that Richard was the sole legal custodian of his children in March of 1984. He was so under a valid order of the San Bernardino Superior Court, the court which issued the Smolins' original divorce and custody decree in 1978. Under the Uniform Child Custody Jurisdiction Act, to which both Louisiana[8] and California subscribe, California maintained exclusive continuing jurisdiction to modify the 1978 order, as it did in 1981 by granting Richard

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8/See, e.g., Wachter v. Wachter, 439 So.2d 1260 (La. App. 5th Cir. 1983).

sole custody of his children.[9] Furthermore, as the California Supreme Court explained, Congress has now preempted this field: under the terms of the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. §1738A), Richard's 1981 sole custody order is binding on, and must be judicially noticed by, all other states (see Pet. App. A, at 31-33).

It thus appears that the parties agree that had the Louisiana extradition papers

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9/"Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside." Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 Fam. L.Q. 203, 214-15, cited with approval in Kumar v. Superior Court, 32 Cal.3d 689, 696 (1982). See also Smolin App. A, at 14-15. Federal law is to the same effect. 28 U.S.C. §1738A(d).

mentioned the California custody decrees, the issuance of a writ of habeas corpus barring the extradition of the Smolins to Louisiana would have been wholly unobjectionable, since the California courts then could have determined as a matter of law "upon the face of the papers" that the Smolins were not substantially charged with a crime. The papers, of course, did not mention either the 1978 California decree or the 1981 modification of it. Instead, they contained Judith's sworn statement on April 31st of 1984 that Richard had had no authority to take custody of the children in Louisiana,

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a statement Judith had to know was false at the time she made it.[10]

This, then, is the nub of this matter: was the San Bernardino Superior Court required in August of 1984 to order the extradition of the Smolins based on an affidavit its own orders demonstrated was knowingly false? Or could it, by taking notice of those orders, find as a matter of law that the Smolins were not substantially charged with a crime under the law of Louisiana? It is to that issue that we now turn.

10/The extradition papers did allege that Judith had legal custody of the Smolin children under a 1981 Texas decree, which in fact merely gave full faith and credit to her 1978 California custody order. The Texas decree thus was founded on the original California order and could not affect the validity of the later 1981 California order modifying the 1978 decree so as to give Richard sole custody of his children.

II

THE CALIFORNIA COURTS ACTED CORRECTLY IN TAKING JUDICIAL NOTICE OF THEIR OWN ORDERS IN DECIDING WHETHER THE SMOLINS WERE SUBSTANTIALLY CHARGED UNDER THE LAWS OF LOUISIANA

California does not deny that the taking of judicial notice is appropriate when deciding whether an alleged fugitive is validly charged under the law of the demanding state. To the contrary, "[t]hat a court may judicially notice the law of the demanding state in determining if the fugitive is substantially charged is not disputed." Pet., at 21 (emphasis in original).

Consequently, California apparently agrees that if a Louisiana domestic relations decision had made clear that Richard was the legal custodian of his children on March 9, 1984, the California courts could have taken judicial notice of that order and determined

that the Smolins were not and could not be substantially charged with kidnapping Jennifer and Jamie. There is no logical reason why California must ignore its own lawful orders in deciding the same question. As the California Supreme Court noted, federal law requires that, sooner or later, the 1981 California decree be judicially noticed in resolving the issue of the Smolins' culpability on the kidnapping charge. (Pet. App. A, at 33.)

California objects that the California courts permitted "the introduction of extrinsic evidence tending to establish innocence in the asylum state" (Pet., at 15), an act prohibited in an extradition proceeding.[11] That characterization of

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11/ See also Brief of Amici Curiae In Support Of Petition For Writ Of Certiorari, at 3-4.

both extradition law and the decision below is misleading.

The introduction of extrinsic evidence is not absolutely prohibited in an extradition proceeding, although the summary nature of such proceedings severely limits the issues upon which such evidence can be offered. California concedes that an extradition warrant can be challenged through habeas corpus on the ground that the petitioner is not the person named in the extradition request or was not in the demanding state at the time the alleged crime was committed. Pet., at 16-23. See also Michigan v. Doran, 439 U.S. 282, 288-89 (1978). Yet adjudication of either of these issues requires the admission of evidence, conceivably voluminous, outside the extradition papers. Furthermore, such evidence, while introduced to prove one fact

-- mistaken identity or lack of fugitivity -- equally proves another: innocence of the crime charged. See, e.g., Hyatt v. Corkran, 188 U.S. 691, 719 (1903) (Petitioner, by proving he was not in demanding state at time of alleged crime, established he was not a fugitive subject to extradition). The fact that evidence admitted for a purpose proper under extradition law also tends to prove innocence does not prohibit its consideration.

The parties agree that the issue of whether the Smolins were substantially charged is one of law, and must be disposed of without the introduction of external evidence relating to a factual defense. The issue of whether Richard was his children's legal custodian on May 9, 1984 is also one of law, however. The use of judicial notice to bring before a court deciding the issue of

"substantial charging" legal orders relevant to that question was entirely within the limited scope of extradition proceedings.

III

AS WITH ANY TYPE OF JUDICIAL ACTION, A COURT DECIDING AN EXTRADITION MATTER MUST BE EMPOWERED TO PREVENT FRAUD

By the time the San Bernardino Superior Court confronted the Smolins' petition to block their extradition in August of 1984, it knew the affidavit accompanying the requisition papers was, at best, grossly misleading and, at worst, perjurious. That affidavit by Judith Smolin Pope stated Richard and Gerard in March of 1984 were without legal custody to take custody of Jennifer and Jamie, yet months before Judith had recognized and lost a challenge to Richard's 1981 sole custody order in the very court confronted with her sworn statement that no such decree existed.

To create an unlimited "fraud" exception to the ban in extradition proceedings on full fledged inquiries into guilt and innocence admittedldy would be unwieldly: any defendant could delay extradition by demanding a full evidentiary hearing on his claim that the allegations against him were based on perjured testimony. The spectre of such procedural gamesmenship is in no way raised by the opinion below, however. If a defendant's claim of fraud requires the taking of testimony or the resolution of evidence in conflict, he must be relegated to the remedies available in the courts of the demanding state. On the other hand, no court should be obligated to issue an order which its own records reveal would promote fraud. That is the extradinary situation in which the San Bernardino Superior Court found itself. The California courts acted

correctly in refusing extradition in this highly unusual set of circumstances.

IV

THE DECISION BELOW IS LIMITED TO ITS FACTS AND WILL HAVE NO APPRECIABLE IMPACT ON THE LAW OF EXTRADITION

The decision of the California Supreme Court does not broaden the permissible scope of extradition proceedings. Its significance lies only in the justice it so obviously worked in the unique circumstances of the Smolins' case.

The opinion below specifically holds that an extraditee may not challenge his extradition from the asylum state on the grounds that he did not commit the act or possess the state of mind required to commit the charged offense (Pet. App. A, at 19). It does not approve the introduction of any form of evidence other than that of court orders

which can be judicially noticed, and are thus "historic facts readily verifiable." Michigan v. Doron, 439 U.S. at 289. It is difficult to imagine a case factually different than the extraordinary one at bar to which the decision below could apply.

California argues that the opinion below will enable those accused of stealing automobiles to resist extradition by claiming they possess "pink slips". (Pet., at 34 n. 13.) The analogy is false, since the simple existence of a "pink slip," which can be fraudulently obtained, cannot conclusively establish ownership. The true analogy would be to a party who fairly litigates his right to an automobile in state A. After losing his suit, he travels to state B and swears out a false affidavit in support of extradition to the effect that his legal adversary, rather than gaining the car in

question through a valid court order of state A, stole it from the declarant while in state B. It is only in such an extraordinary situation that the opinion below could be invoked, allowing the courts of state A to prevent a blatant fraud and miscarriage of justice. This Court need have no quarrel with that result.

CONCLUSION

This case does not involve the question of whether the Smolins committed a crime in Louisiana or whether they validly can be convicted for it. They did not, and they cannot. Rather, what is at issue is whether they must suffer the enormous financial and emotional burden of extradition to a foreign state to stand trial on a charge deemed groundless by every judge who has had a

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meaningful chance to consider it.[12] The decision below avoids that patently unfair result while doing no damage to the law of extradition. It should be left undisturbed, and California's petition for certiorari should be denied.

DATED: October 29, 1986

Respectfully submitted,

RIORDAN & ROSENTHAL

BY Dennis P. Riordan
DENNIS P. RIORDAN

Attorney for Real
Parties In Interest

12/The dissenting opinion in the California Supreme Court acknowledged that on March 9, 1984 Richard had a valid sole custody order. (Pet. App. A, Lucas dissenting, at 11 n. 4.)

A P P E N D I X "A"

FILED
Keeman G. Cassady, Clerk
February 25, 1986
COURT OF APPEAL
FOURTH DISTRICT

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re the Marriage of RICHARD SMOLIN AND JUDITH SMOLIN	)
RICHARD SMOLIN, Respondent,	) E001146
v.	) Sup.Ct.No.) FL 30380
JUDITH SMOLIN POPE, Appellant.	) OPINION) ON) REHEARING

APPEAL from the Superior Court of San Bernardino County. William Pitt Hyde, Judge. Reversed.

Don A. Haskell for Appellant.

Riordan & Rosenthal, Dennis P. Riordan and Albert H. Maldonado for Respondent.

Judith Smolin Pope appeals from an order confirming a prior order granting sole custody to her former husband, Richard Smolin, and terminating child support.

FACTS

The parties were married in San Bernardino County. The two minor children, Jennifer Leann, born May 31, 1973, and Jamie Christopher, born October 16, 1974, resided in San Bernardino County until November 1979, when Judith removed them from the State of California.

Judith and Richard obtained a final judgment of dissolution of their marriage on April 6, 1978, in the San Bernardino Superior Court. The judgment provided that custody of the minor children was awarded to Judith with rights of reasonable visitation to Richard.

In August of 1979, Judith was married to her present husband, James Pope, and in November of 1979 she moved with Mr. Pope and the minor children to Oregon. Judith did not advise Richard of her intent to move to Oregon until after she had moved, although she had agreed as a part of their settlement agreement not to leave the state without his consent. Richard received notice of the move about a week after it had occurred. Thereafter, Mr. Pope, who was in the construction business, was offered a position in Dallas, Texas and the family moved to Texas in January of 1980. Again Judith did not inform Richard, and he did not learn of their whereabouts until several months later.

On September 15, 1980, Judith commenced a proceeding in Texas for judicial notice of the Califiornia statutes and the California

judgment. Richard was served but did not appear in that action.

Thereafter, on October 3, 1980, Richard filed an order to show cause in the San Bernardino Superior Court to modify custody. Judith was served but did not appear. Richard did not advise the California court that a proceeding had been commenced in Texas. On October 27, 1980, Richard obtained an order modifying custody and awarding him joint custody but with primary care remaining with Judith. Richard was granted custody during summer vacations and during the Christmas vacation of 1980. Judith's Texas attorney was served with a copy of this order. He advised Richard's attorney that it was his opinion the order was not enforceable in Texas due to lack of jurisdiction in the California court. On January 9, 1981, Richard brought an order to show cause

against Judith for contempt of the 1980 joint custody order. He also sought a modification granting him sole custody.

On February 13, 1981, the Texas court issued a decree extending full faith and credit and confirming that Judith had custody of the minor children. There is nothing in the record to show whether Judith's attorney had advised the Texas court of the joint custody or that an order to show cause had been filed in the California court.

On February 27, 1981, the San Bernardino Superior Court found that Richard had been denied Christmas visitation rights provided in the 1980 joint custody order and granted him sole custody of the children, subject to Judith's right to reasonable visitation. The court also terminated child support.

Richard did not then seek to obtain physical custody of the minors, but did not

provide any support for them after December, 1980.

In March of 1981, Judith's husband was again transferred and the family moved to Louisiana.

Richard testified that he learned of the children's whereabouts in October of 1982, through a friend of Judith's, and that he did not learn their precise address until January of 1983. He testified that he had his first telephone conversation after they left Texas on January 13, 1983, and sent them gifts at Christmas in 1983. There was no further contact between Richard and the children until March 9, 1984, although Richard testified that he had some contact with the district attorney's office "towards the end of 1983" and started to discuss the possibility of securing a warrant in lieu of a writ of habeas corpus. However, no action

was taken to secure the warrant until he was served in an adoption proceeding in Louisiana.

In January of 1984, Judith and her husband filed a petition in a Louisiana court for the adoption of the minors by Mr. Pope. Richard was served in that action sometime in February of 1984.

On March 9, 1984, at approximately 7:20 a.m., Richard, without notice to Judith, removed the children from a school bus stop in Slidell, Louisiana.

As a result of the removal of the children without use of legal process and without notice to Judith, criminal proceedings were initiated, Richard was charged with kidnapping, and extradition was sought against Richard by the State of Louisiana. (See San Bernardino Superior Court Case No. SCV 224030.)

In explaining his use of self-help, Richard testified as follows:

"Q (BY MR. RICHARDSON) Now, I believe it was in January, you testified that you were served with a petition for a non-consentual [sic] adoption and name change; is that correct?

"A That's correct.

"Q January of '84?

"A That's correct.

"Q And you were at that time contemplating the service of the warrant in lieu of writ of habeas corpus?

"A I had thought about it because I had previous contact with the District Attorney's Office. But upon receipt of the non-consentual [sic] stepparent adoption, petition and name change, it was the very first step that I took to secure my custody of the children.

"Q Now, was it your understanding that if this warrant in lieu of writ were served in Louisiana, that the children would immediately be returned to you in California or that there would be some proceedings?

"A It was my understanding that if I attempted to use the warrant in lieu of writ of habeas corpus in light of a stepparent adoption proceedings pending, that the -- all the issues would end up being litigated in Louisiana, including the validity of the California order."

On April 11, 1984, Judith initiated an order to show cause in the San Bernardino Superior Court to set aside the custody order of February 27, 1981, whereby Richard was awarded sole custody and child support was terminated. It is from the court's reaffirmation of those orders on May 31, 1984 that this appeal has been taken.

DISCUSSION

Judith raises the following issues on appeal:

(1) Did the California court have jurisdiction over the custody issues?

(2) Assuming jurisdiction, did the trial court abuse its discretion by exercising jurisdiction and removing physical custody from appellant in light of respondent's unclean hands?

(3) Did the trial court abuse its discretion by finding it in the best interests of the children to confirm sole custody in the respondent?

I. Jurisdiction

The Uniform Child Custody Act, Civil Code section 5152,[1] sets forth jurisdictional grounds in child custody

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1/All statutory references are to the Civil Code unless otherwise stated.

matters. The provisions pertinent in this case are as follows:

"(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

"(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or persons acting as parent continues to live in this state.

"(b) It is in the best interest of the hcild that a court of this state assume

jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

". . . . . .

"(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."

It is clear that California was not the "home state" within the meaning of subdivision (a). "Home state" is defined by the Uniform Child Custody Act, section 5151, as follows:

"(5) 'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a

parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six-months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period."

In January of 1981, when Richard initiated his first order to show cause for a modification of the custody decree, the children had not resided in the state of Calfiornia since November 1979. They had been living with their mother and stepfather continuously since they left California and had resided in Texas for more than one year.

Thus, Texas was the home state within the meaning of subdivision (a) at the time Richard's initial request for modification was filed. Furthermore, the jurisdiction of

the Texas court had already been invoked prior to the filing of his order to show cause for modification.

Nevertheless, the fact that Texas had become the home state did not necessarily oust California of modification jurisdiction.

In Kumar v. Superior Court (1982) 32 Cal.3d 689, the California Supreme Court considered the difference between initial jurisdiction and modification jurisdiction and concluded that under section 5163,[2] the strong presumption is that the decree state will continue to have modification

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2/Section 5163 in part provides:
"(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state had jurisdiction."

jurisdiction until it loses all or almost all connection with the child.

Moreover, "'Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside.'" (Kumar v. Superior Court, at p. 696, quoting with approval Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA (1981) 14 Fam. L.W. 203, 214-215.)

In Kumar the Supreme Court found a "significant connection" with the home state of New York although the child had been

absent for 18 months at the time of the commencement of the California proceeding.

The basis for California modification jurisdiction in this case and the one relied on in the change of custody order, was subdivision (b). In its order of February 27, 1981, modifying custody, the court stated:

"1. That the minor children have sufficient contacts with the State of California to continue to provide a basis, for the Superior Court, State of California, County of San Bernardino, to exercise continuing and concurrent jurisdiction, pursuant to Civil Code section 5152, subdivision (1)(b) as construed together with

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Civil Code section 4600 as amended and 4600.5 as enacted."[3]

The San Bernardino Superior Court in the February 27, 1981, order went on to make the following findings:

"2. That the Petitioner has been frustrated in facilitating the order of this Court, dated October 27, 1980, with respect to the Christmas visit, provided in the

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3/Civil Code sections 4600 and 4600.5 do not assist in the determination of jurisdiction as section 4600.5 specifically provides in subparagraph (j) that: "Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section."

Moreover, the specific provisions of the Uniform Child Custody Act relating to jurisdiction prevail over more general provisions of Civil Code section 4600 and Code of Civil Procedure section 410.50. (In re Marriage of Steiner (1979) 89 Cal.App.3d 363, 371; Smith v. Superior Court (1977) 68 Cal.App.3d 457.

order, as a result of Respondents [sic] refusal to allow any contacts between the Petitioner and said minor children.

"3. That it is not in the best interests of the minor children that the Petitioner be deprived of frequent continuing and meaningful contacts with the minor children. That it is in the best interests of the minor children that sole custody be awarded to the Petitioner subject to the Respondents [sic] right of reasonable visitation."

It is not enough merely to state that it is in the best interest of the children that a California court assume jurisdiction. Section 5152, subdivision 1(b) clearly requires that the finding of best interest be predicated upon the fact that "the child and his parents, or the child and at least one contestant, have a signifiant connection with

this state, and . . . there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

After a careful review of the record, we conclude that there is substantial evidence to support the finding of modification jurisdiction.

At the time of the initial hearing, although Judith had had continuous custody of the minor children since the parties' separation on March 9, 1977, when the children were aged 4 years (Jennifer) and 2 years (Jamie), Richard had exercised his right to visitation until Judith removed them from with [sic] the State of California in November of 1979.

Because the children had spent the first several years of their lives in California,

and the father continued to exercise visitation with the children until prevented by Judith's removal of the children, it cannot be said that there was insufficient evidence to support the trial court's finding of a significant connection with the state within the standard established by Kumar.

II. Unclean Hands

Judith contends that, even if the California superior court had jurisdiction at the time of the modification hearing, it was an abuse of discretion to exercise jurisdiction because of Richard's unclean hands.

The Uniform Child Custody Act, section 5157, provides in pertinent part as follows:

"(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline

to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

"(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances." (Emphasis added.)

It is clear that if Richard had made an initial application for custody after the

removal of the children from Louisiana without legal process and without the knowledge of the mother, the court could have declined jurisdiction pursuant to the discretionary provisions of subdivision (1).[4]

However, because the abduction did not occur until after Richard's successful application for modification in the San Bernardino court, the mandatory provisions of subparagraph (2) do not apply. In any event, Judith may not now collaterally attack the February 1981 order on any but jurisdictional grounds.

III. Abuse of Discretion

4/It is also noteworthy that if Judith had sought to modify the California decree in another Uniform Code state, that state court could have declined jurisdiction pursuant to the discretionary provision of subdivision (2), based upon her removal of the children from California in violation of the custody order.

The order before this court on appeal is the order of May 31, 1984, "reaffirming" the sole custody in Richard which was granted under the order of February 27, 1981. Therefore, it is the May 1984 order we must consider in the light of appellant's argument that the court abused its discretion in granting Richard physical custody of the children.

. . . . . .

While it is certainly sad that the father's efforts at visitation were frustrated to the extent they were, that alone does not provide an adequate factual basis to support an award of sole custody to the father. Absent any showing that it is in the best interest of the children for them to be separated from the mother who has had the responsibility of their care and nurturing for their entire lives, the sole custody

order in this case can only be viewed as punitive.

We find that it was an abuse of discretion for the trial court to ccnfirm the award of sole custody in this case.

The order awarding custody to Richard is reversed and the matter remanded for further proceedings consistent with the Uniform Child Custody Act.

NOT FOR PUBLICATION.

/s/ MORRIS
P.J.

We concur:

/s/ MC DANIEL
J.

/s/ RICKLES
J.